

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-217072.2

DATE: May 23, 1985

MATTER OF: Joule Engineering Corporation--
Reconsideration

DIGEST:

1. Where protester's statement that written protest to procuring agency, initially viewed by GAO as untimely, was merely confirmation of timely oral protest is unquestioned by agency, it establishes that protest to GAO was timely.
2. Agency's failure to include protester's proposal in the competitive range, based upon the evaluation of proposals and revised technical scores reflecting projected improvement in proposals if discussions were held, was not unreasonable or in violation of applicable statutes and regulations.

Joule Engineering Corporation requests reconsideration of our decision in Joule Engineering Corporation, B-217072, Nov. 26, 1984, 84-2 CPD ¶ 575 dismissing its protest. Joule had protested a National Aeronautics and Space Administration (NASA) determination that the company's proposal under request for proposals (RFP) No. 5-01919/603 was not within the competitive range and thus not eligible for further consideration. In its protest letter to our Office, Joule represented that it had initially filed a protest with NASA on September 26, 1984. Based upon this information, we held that Joule's protest to our Office was untimely under our Bid Protest Procedures, 4 C.F.R. § 21.2(a) (1984), because the NASA protest had not been filed within 10 days after Joule knew of the basis for its protest. In its request for reconsideration, Joule states that it orally protested to NASA on August 15, 2 days after learning of the NASA competitive range determination, and that its September 26 protest letter was

in confirmation of the timely oral protest. NASA has not contested this account, and, based upon the new information provided by Joule, we find the protest to have been timely and reverse our earlier decision. On the merits, however, we deny the protest.

The RFP sought proposals for engineering and related services to support sounding rocket and balloon programs, aeronautical programs, and launch range operations at Wallops Flight Facility, Wallops Island, Virginia. The procurement is the result of the merger of requirements currently being performed under two separate contracts. Joule is the current contractor for metal trades and instrumentation services, about one-third of the effort to be required under the protested procurement. The solicitation provided that proposals would be evaluated based upon four weighted "mission suitability" factors, cost experience and past performance, and "other factors" such as financial condition and capability and stability of labor-management relations.

NASA received four proposals and on August 8 it informed Joule that the Source Evaluation Board found Joule's proposal outside the competitive range. The agency stated that Joule's proposal contained numerous technical weaknesses under three of the four mission suitability factors, that there was a deficiency under one of those factors, and that Joule's experience and past performance had been determined to be weak.

Joule contends that, in excluding its proposal from further consideration, NASA failed to address the extent to which the proposal could be improved through written or oral discussions with the agency. In a procurement such as this one, in which evaluations are conducted in accordance with the NASA Source Evaluation Board Manual (NHB5103.6A), the Source Evaluation Board must include proposals "which have a reasonable chance of being selected for final award" within the competitive range for purposes of conducting written or oral discussions. NASA Procurement Regulation § 3-804-3(b)(4), reprinted in 41 C.F.R. ch. 13 (1983). The Board must evaluate the potential for improving each proposal by written or oral discussion in determining the competitive range. Id.

The Board did that here. First, it gave the initial proposals numerical scores on each of the mission suitability factors described in the RFP, with a possible maximum total of 1000 points.^{1/} The other evaluation areas were rated as "good," "adequate" or "poor" without numerical scores. The Joule proposal was initially scored third of the four proposals received on the mission suitability factors. (820, 739, 398 (Joule) and 80.) NASA then rescored each proposal based upon assumed positive responses that it anticipated it would receive during discussions regarding ambiguities and uncertainties found in the initial evaluation. The total projected scores were 825, 771, 477 (Joule) and 210. Again, the Joule proposal scored third, well below the two more highly rated proposals. NASA also conducted an evaluation of each offeror's cost/price proposal to determine its probable cost to the government. All four proposals were relatively close with regard to both initial estimated costs and their probable costs to the government. The experience and past performance of the offerors and most of the "other factors" evaluated were in NASA's view unlikely to be improved through written or oral discussions, and NASA did not project improvements in those areas in determining which proposals were within the competitive range.

Joule does not agree that its proposal should have been evaluated as it was. Moreover, Joule argues that NASA's conclusion that the Joule proposal had insufficient potential for improvement is unreasonable. According to Joule, the weaknesses and deficiencies perceived in its proposal were "of the type easily improvable through oral discussions."

^{1/} The board initially gave each proposal a score between 0 and 5 (from "unacceptable" to "outstanding") for each factor or, if a factor was divided into criteria, for each criterion. Each of these raw scores was then "weighted" by multiplying the number of points available for the factor or criterion by the raw score divided by 5. I.e., a raw score of 3 for a factor having 100 possible points would result in a weighted score of 60 for that factor. The scores discussed in this decision are all weighted scores.

In reviewing complaints about the reasonableness of the evaluation of a technical proposal, and the resulting determination of whether an offeror is within the competitive range, our function is not to reevaluate the proposal and to make our own determination about its merits. That determination is the responsibility of the contracting agency, which is most familiar with its needs and must bear the burden of any difficulties resulting from a defective evaluation. Procuring officials have a reasonable degree of discretion in evaluating proposals, and we therefore determine only whether the evaluation was arbitrary, that is, unreasonable or in violation of the procurement laws and regulations. Essex Electro Engineers Inc.; ACL-Filco Corp., B-211053.2; B-211053.3, Jan. 17, 1984, 84-1 CPD ¶ 74.

Although Joule has the burden of affirmatively proving its case, NASA has denied the company access to most of the written procurement record because the agency is withholding contractor selection pending our decision on this protest. NASA is concerned that Joule would have a competitive advantage after receiving access to the evaluation record if it is included within the competitive range as a result of our decision. The agency did meet with Joule officials to provide an oral debriefing about the evaluation decision, and, based upon Joule's submissions to our Office, it appears the debriefing provided Joule with considerable detail about the reasons for NASA's determination. In any event, consistent with our practice in such situations, we have examined the record in camera to determine whether the evaluation had a reasonable basis. See RMI, Inc., B-203652, Apr. 20, 1983, 83-1 CPD ¶ 423.

The governing statute, 10 U.S.C. § 2304(g) (1982), requires that oral or written discussions be held with all offerors within a competitive range. Such discussions must be meaningful, and in order for discussions to be meaningful, agencies must point out weaknesses, excesses or deficiencies in proposals unless doing so would result in disclosure of one offeror's approach to another or result in technical leveling when the weakness or deficiency was caused by a lack of diligence or competence. The Advantech Corp., B-207793, Jan. 3, 1983, 83-1 CPD ¶ 3; Ford Aerospace & Communication Corp., B-200672, Dec. 19, 1980, 80-2 CPD ¶ 439.

Consequently, in projecting the potential for improvement of a proposal during discussions, an agency must base its projection upon the assumption that the discussions would be meaningful. Our review of the Board's findings in this case will be based on the requirement for meaningful discussions.

The first mission suitability factor described in the RFP is "Management." This factor is given the highest weight (43 percent) of the four mission suitability factors, and is divided into the following criteria: 1.1 Organizational Structure, 1.2 Task Assignment Administration, and 1.3 Staffing Plan and Personnel Administration. With regard to 1.1 Organizational Structure, the Board found several weaknesses, most of which concerned insufficient information in the proposal. Assuming a positive response to discussion of the need for additional information, NASA projected an improvement of Joule's weighted score on Organizational Structure from 62.22 to 96.22 (out of 170 possible points). One major weakness, the unacceptability of Joule's proposed organization at the Wallops Island facility, is not related to a lack of information in the proposal, but represents the Board's judgment on Joule's management approach. Joule claims that its proposed method of operation could be improved through discussions. This might be true if NASA were to point out the weakness to Joule during discussions. We believe, however, that it is reasonable to consider the weakness in Joule's proposed local organization to be one which is inherent in the offeror's proposed management structure and would likely require extensive proposal revisions to resolve. We do not believe it was improper for NASA to conclude that this matter would be excluded from discussions.

The Board considered Joule's proposal to be adequate in regard to the second management criterion, 1.2 Task Assignment Administration, and it did not cite specific weaknesses. Consequently, the Board reasonably projected no improvement in Joule's initial weighted score (66 out of a possible 110). The weaknesses found in the proposal concerning the third criterion, 1.3 Staffing Plan and Personnel Administration, substantially concerned matters which Joule did not address in its proposal, such as a failure to provide an initial staffing plan for personnel not already employed by the company. This need for

information would have been included as a subject of discussions with Joule, and NASA projected a substantial improvement in Joule's score--from 60 to 105 (out of 150 possible points). In sum, the Board concluded that the Joule proposal has a strong potential for improvement in the management factor score from 188 to 267.

The protester argues that, because it is the current incumbent contractor for a large portion of the work described in the RFP, its proposal should have been considered particularly capable of improvement in the management area. It is not clear why Joule's prior experience would give its proposal more potential for improvement than others. Joule's current contract is not necessarily a positive factor with respect to aspects of the work which it has not previously performed. For example, the Board emphasized that Joule provided an inadequate initial staffing plan in spite of the fact that it already employed personnel in one-third of the required positions. It can be argued that an incumbent contractor that scored as low as Joule on its initial proposal may have less potential for improvement since it may be less likely to revise its proposed personnel and method of operations during discussions. In any event, we do not find NASA's evaluation of the "Management" factor to have been unreasonable.

The second mission suitability evaluation factor, "Understanding Requirements," is divided into two criteria: 2.1 Designated Positions and Commitment Thereof, and 2.2 Total Compensation Plan for Professional Employees. The first criterion requires offerors to describe in their proposals specific personnel that meet detailed qualifications for 25 positions listed in the RFP and that are available for the listed jobs. This criterion is considered very important because it gives NASA a specific measure of each offeror's understanding of what is required to perform the work and its demonstrated capacity to fill the designated positions. The second criterion is used to evaluate each offeror's total proposed compensation compared to levels paid by the predecessor contractor for the same work. The RFP cautions offerors that lowered compensation for the same professional work may be considered a lack of sound management judgment in addition to a lack of understanding of the contract requirements.

The Board gave Joule only 68 out of a possible 170 points for Designated Positions and projected no improvement during discussions. This was primarily because, according to the resumes submitted, more than one-third of the individuals proposed did not meet the education or experience qualification requirements listed in the RFP. Joule also did not provide required evidence of commitments by the individuals to assume the designated positions at the salaries proposed. Joule asserts that it contemplated hiring incumbent personnel for all of the designated positions, but, because the individuals not already employed by Joule were concerned about reprisals from their current employer, Joule could not include their resumes in the proposal. The protester contends that the resumes submitted were for "similarly qualified" personnel, and that any weaknesses could be improved through discussions.

The resumes submitted for designated positions do not meet the unambiguous qualifications listed in the RFP. Joule's proposal offered no explanation of why, based upon the company's understanding of the work, the proposed personnel need not meet the required qualifications. We share NASA's view that this is a major weakness either reflecting a lack of understanding of the requirements to perform the work or resulting from a lack of diligence or competence in proposal preparation. Discussions would effectively result in NASA rewriting Joule's proposal in this area, bringing the proposal toward the level of other superior proposals. We believe that NASA reasonably considered this weakness in Joule's proposal to be one that need not be pointed out, and, therefore, not one that would be improved during discussions.

Further, in this regard, Joule does not address the omission from its proposal of salary commitments for designated positions. It contends that the salary commitments for three key persons required in another section of the proposal were omitted by error. In that case, Joule believes NASA should have recognized that the omission for key personnel was inadvertent rather than assuming that no commitments existed. The protester argues that, if NASA pointed out that omission during discussions, the company would supply the commitments. We believe that the same argument is applicable to the omission of salary commitments for designated personnel. An inquiry during discussions would quickly resolve whether the salary

commitments for designated positions were omitted by error or resulted from an inability of Joule to obtain the commitments. NASA should have anticipated a rating improvement based upon some positive response to discussions in this area.

The board gave the Joule proposal a relatively low rating (11.7 out of 50) for Total Compensation Plan for Professional Employees, and projected no potential for improvement. NASA cited such weaknesses in the proposal as a reduction in professional employee salaries posing the possibility of hiring difficulties, an absence of detail regarding medical and disability benefits, and a lack of a pension plan. Joule replies that its ability to negotiate lower salaries under the prospective contract should not be viewed as a weakness, and that further detail regarding its medical and disability benefits would have been provided upon request.

Joule proposes to reclassify 13 positions involving 25 employees from being exempt from the requirements of the Service Contract Act to not being exempt. Twenty-six of the remaining exempt positions (31 employees) were to receive salary reductions averaging 16 percent, while 5 positions (5 employees) were to receive increases averaging 4 percent. Salary reductions averaging 12.9 percent were proposed for 19 exempt personnel currently employed by Joule, while 3 would receive raises averaging 2.3 percent. In view of the protester's failure to provide an initial hiring plan and the required evidence of a commitment to specific salaries by prospective personnel in designated positions, we do not consider unreasonable the board's view that Joule would have a problem hiring qualified personnel. Further, we do not believe that NASA erred in considering this weakness to be inherent in the company's management judgment and unnecessary to include in possible discussions. See Dynalectron Corp., Lockheed Electronics Co., Inc., 54 Comp. Gen. 562,570-1 (1975), 75-1 CPD ¶ 17 at 14-15, aff'd on recon. 54 Comp. Gen. 1009 (1975), 75-1 CPD ¶ 341. We do, however, question whether NASA should not have attributed some potential for improvement in Joule's proposal with respect to the need for details on medical and disability benefits. While offerors are reasonably expected to discuss medical and disability plans in connection with their proposed total compensation for professional employees, the RFP does not indicate the level of detail desired. We believe that this weakness was more in the nature of a lack of clarity

rather than a weakness inherent in Joule's judgment or level of competence, and NASA should have recognized some potential for improvement.

The third mission suitability factor, "Corporate Resources," represents an evaluation of proposed corporate technical support to personnel performing the contract work. Here, the Board believed that the Joule proposal had two strong points, and cited no weakness or uncertainties. The proposal was rated at 90 out of 150 points, with no projected improvement during discussions. Joule does not take specific exception to this score, and based on our review of the proposals we have no reason to question the Board's judgment in the rating-given the Joule proposal for corporate support.

The Board gave the Joule proposal a low score for the "Key Personnel" factor (40 out of 200 possible points), which is used to evaluate the qualifications of the Contract Manager, the Metal Trades Supervisor and the Instrumentation Construction Supervisor. The Board found that the proposed Contract Manager had good plant management experience but no service contract management experience and limited engineering expertise, a major weakness since two-thirds of the required work consists of engineering services in many technical areas. The Board also cited minor weaknesses based upon its findings that the Metal Trades Supervisor does not have the required general or related experience listed in the RFP for the position, and that no salary commitments for key personnel were provided.

Joule argues that NASA should have discussed with the proposed Contract Manager his experience and should not have relied only upon the resume in the proposal and discussions with references listed in the resume. The protester does not suggest what additional facts NASA might learn from such a discussion, stating merely that the matter would be "clarified." We believe that NASA was reasonable in basing its evaluation upon the resume and references, and have no reason to question the evaluation itself.

Joule argues that the proposed Metal Trades Supervisor has been performing the job for 10 years with no complaints. Indeed, the Joule proposal described the individual's current position and the record establishes

that the Board was informed of his work on the predecessor contract. The RFP, however, states a requirement for 4 years of recent journeyman experience that Joule's proposed Metal Trades Supervisor lacks. Thus, it was reasonable for the Board to conclude that the proposal contained a minor weakness in this respect.

As discussed previously, Joule contends that its failure to comply with the requirement of the RFP for commitments of key personnel to work at proposed salaries constituted an oversight. We believe that NASA should have anticipated discussions to determine if the omission of salary commitments resulted from Joule's inability to reach an agreement with the proposed employees or constituted a minor oversight in proposal preparation. Thus, the agency should have projected some improvement in score based upon a positive response during discussions.

The Board attributed Joule's performance of approximately one-third of the contract work for 14 years as a strong point. Joule, however, did not demonstrate across-the-board technical experience or depth in past performance. The company only cited five government contracts in its proposal which were of a comparable or related nature and complexity and under which work was performed in the past 5 years--two for support of programs at the Wallops Flight Facility under which the agency rated Joule's performance as adequate, two other NASA contracts under which no work had begun, and a \$50,000-Navy contract completed in 1979. The RFP contemplates an award fee contract, and no experience with such contracts was cited in the proposal. Also, apparently none of the corporate references about subcontract performance responded to NASA contacts.

Joule contends that its potential for improvement in this area is strong because of its experience at the Wallops Flight Facility. We disagree, since by its nature Joule's experience had to have been accumulated prior to this procurement. There is no reason to assume that Joule omitted from the proposal relevant government contract experience at Wallops Island or in addition to its NASA Wallops Island support contracts that would be disclosed during discussions. Moreover, Joule has not contended that it has additional relevant experience that would present a potential for improvement during discussions.

Joule also argues that NASA should have pursued the corporate references or discussed the lack of responses. The proposal contains the name, address, and telephone number of individuals in five companies or divisions of companies for which Joule provided subcontract services related to the proposed NASA work. The protester included no description of the services rendered to the companies, no dates for performance, or any other information helpful in evaluating experience and past performance. The individuals listed as references apparently did not respond to NASA contacts, and Joule was given no credit for whatever experience and past performance it may have had. We do not believe that NASA was obligated to pursue references listed in Joule's proposal who did not respond to initial contacts, particularly since there was no evidence of how closely related Joule's subcontract experience was to the proposed contract work. Although difficulties in reaching the references might be a subject of discussions, Joule's failure to provide details about its subcontract experience makes any projection of an improvement highly speculative. Nevertheless, if apprised during discussions of difficulties in reaching corporate references, Joule might have been able to establish the necessary contacts. Consequently, some potential for improvement based upon the references should have been considered by NASA.

The Board determined that the Joule proposal was not within the competitive range because its projected score on mission suitability factors and its rating for experience and past performance fell so far below the two more highly rated proposals that there was no reasonable chance for Joule to receive an award. This approach to determining the competitive range based upon the array of initial evaluation scores and the offeror's relative standing is acceptable. Art Anderson Associates, B-193054, Jan. 29, 1980, 80-1 CPD ¶ 77.

In our view, crediting the Joule proposal with improvements in the areas in which we think the Board should have considered potential improvement would not substantially change Joule's relative standing or place it within the competitive range. NASA considered the omission of salary commitments for designated and key personnel and the lack of detail about medical and disability benefits to be minor weaknesses. In each of the evaluation factors or criteria in which these minor weaknesses were found, the Joule proposal had other major weaknesses.

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Even if the proposal were credited with one-third of all available points in the Understanding Requirements and Key Personnel factors (140 and 160 possible points, respectively), Joule's projected score (577) would remain almost 200 points below that of the next more highly rated offeror (771). Similarly, Joule's experience and past performance as disclosed in its proposal is so far below that of the two more highly rated proposals that discussions with the company's subcontract references could increase its standing very little. Consequently, we do not believe that Joule was prejudiced by the NASA evaluation approach, and that exclusion of its proposal from the competitive range was not unreasonable or in violation of applicable statutes or regulations.

The protest is denied.

for *Seymour Efron*
Harry R. Van Cleve
General Counsel